

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK PAUL HANSON,

Defendant-Appellant.

UNPUBLISHED

May 22, 2007

No. 264899

Wayne Circuit Court

LC No. 04-500047

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant pleaded no contest to misdemeanor assault and battery.¹ The trial court sentenced him to 24 months' probation and ordered him to pay restitution to the victim in the amount of \$17,164.10. After the order of probation was discharged, the trial court entered a second restitution order, which ordered defendant to pay an additional \$5,502.91 in restitution. Defendant filed an application for leave to appeal with this Court, which we denied "for lack of merit in the grounds presented."² Our Supreme Court remanded this case to this Court for consideration as on leave granted. *People v Hanson*, 474 Mich 852; 702 NW2d 580 (2005). We vacate the second restitution order and remand for further proceedings consistent with this opinion.

On May 22, 2001, defendant pleaded no contest to assault and battery. The transcript from the plea hearing does not indicate that there was any type of agreement regarding restitution.³ At sentencing, the trial court ordered defendant to pay restitution in the amount of

¹ The sentencing transcript indicates that defendant was charged with aggravated assault and pleaded no contest to misdemeanor assault and battery. However, the order of probation lists the offense as aggravated assault.

² *People v Hanson*, unpublished order of the Court of Appeals, entered March 18, 2005 (Docket No. 258495). Judge Borrello would have granted the application.

³ "[A] defendant who enters into a plea agreement that includes restitution 'implicitly agree[s]' to pay restitution in an amount to be decided by the court." *People v Grant*, 455 Mich 221, 237; 565 NW2d 389 (1997), quoting *People v Hart*, 211 Mich App 703, 708; 536 NW2d 605 (1995).

\$17,164.10 and stated on the record that it was “keeping the issue of restitution open.” According to the trial court:

I am ordering restitution in the amount to date of all the bills we’ve received. I know there’s some still in the pipeline and will be some in the future. . . . *I am keeping the issue of restitution open.* I’m keeping the issue of whether or not the Court may issue a civil judgment so that the . . . victim may have further time to collect on this if it is not collected during the probationary period. Any requests for restitution in the future, that is stated by a doctor to be related to the original assault and reasonably necessary for her treatment will automatically be added when it is accompanied by that statement. [Emphasis added.]

The order of probation also stated “RESTITUTION TO REMAIN OPEN[.]” Defendant did not object to the trial court’s decision to keep restitution open or to the trial court’s ruling on the record regarding any future restitution requests on the part of the victim.

The order of probation was discharged by an order entered on June 24, 2003. The order discharged defendant from any unfulfilled obligations but expressly provided that “collection for unpaid . . . restitution may be pursued according to law.” Shortly after probation was discharged, the victim sought additional restitution in the amount of \$21,785 for medical expenses and miscellaneous expenses⁴ and \$3,105.79 for prescriptions. The trial court held a hearing on January 14, 2004. In support of her request for additional restitution, the victim provided the court with documentary evidence. Defense counsel asserted that no foundation had been laid for the documents and that defendant should have the right to investigate and conduct discovery regarding the victim’s claimed expenses. Defendant did not explicitly request an evidentiary hearing at this time, but he sought permission to engage in discovery, specifically to conduct interrogatories and take depositions, to investigate whether any of the victim’s medical conditions existed before the assault. The trial court observed that defendant had not appealed at sentencing when the trial court ordered that future restitution would be automatic if it related to the original assault and was reasonably necessary for the victim’s treatment. According to the trial court, defendant could challenge the amount of an expense or whether a doctor had ordered it, but he could not challenge whether the treatment was appropriate. The trial court gave defendant 21 days to file written objections to the victim’s request for additional restitution or to file a motion for additional discovery.

Defendant filed a motion requesting an evidentiary hearing and the opportunity to conduct discovery. At a hearing on April 21, 2004, defendant argued that due process and the Crime Victim’s Rights Act, MCL 780.751 *et seq.*, gave defendant the right to an evidentiary hearing. Defendant further argued that under *People v Gahan*, 456 Mich 264; 571 NW2d 503 (1997), he was entitled to an evidentiary hearing because he objected to the restitution sought by plaintiff. Defendant also asked the trial court to permit defendant to engage in discovery before the evidentiary hearing. The trial court denied defendant’s request for an evidentiary hearing,

⁴ The miscellaneous expenses were apparently related to house cleaning and carpet cleaning services.

stating that it considered the hearing of January 14, 2004, to be an evidentiary hearing. The trial court also denied defendant's request for discovery. On April 28, 2004, the trial court issued a second order of restitution, which required defendant to pay the victim an additional \$5,502.91 for medical expenses.

Defendant argues that the trial court erred in refusing to conduct an evidentiary hearing on the issue of the proper amount of restitution when the victim requested restitution after the order of probation had been discharged. According to defendant, the Crime Victim's Rights Act, MCL 780.767(4), provides that disputes regarding the proper amount of restitution must be resolved by a preponderance of the evidence, and an evidentiary hearing is therefore required when there is such a dispute.

Crime victims have both a statutory and constitutional right to restitution. Const 1963, art 1, § 24; MCL 780.766; *People v Grant*, 455 Mich 221, 229; 565 NW2d 389 (1997). The Crime Victim's Rights Act, MCL 780.766(2), requires a defendant to "make full restitution to any victim of the defendant's course of conduct" MCL 780.767 provides:

(1) In determining the amount of restitution to order under section 16, the court shall consider the amount of the loss sustained by any victim as a result of the offense.

(2) The court may order the probation officer to obtain information pertaining to the amounts of loss described in subsection (1). The probation officer shall include the information collected in the presentence investigation report or in a separate report, as the court directs.

(3) The court shall disclose to both the defendant and the prosecuting attorney all portions of the presentence or other report pertaining to the matters described in subsection (1).

(4) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

In *Gahan*, *supra* at 276, our Supreme Court held that the Crime Victim's Rights Act, MCL 780.767(4), "affords [a] defendant an evidentiary hearing when the amount of restitution is contested and further provides that the prosecution bears the burden of establishing the proper amount." However, "only an actual dispute, properly raised at the sentencing hearing in respect to the type or amount of restitution trigger the need to resolve the dispute by a preponderance of the evidence." *Grant*, *supra* at 43 n 8.

Plaintiff argues that defendant waived the right to challenge the trial court's second order awarding restitution because he did not object at sentencing when the trial court awarded open-ended restitution and established the procedure for the award of future restitution. In *Gahan*, our Supreme Court held that the defendant waived his opportunity for an evidentiary hearing "because . . . at sentencing defendant did not request an evidentiary hearing regarding the amount of restitution that was properly due. This was a waiver of his opportunity for an evidentiary

hearing and he cannot now argue that he was denied due process.” *Gahan, supra* at 276 (footnotes omitted). It is true that at sentencing, defendant did not object to the trial court’s decision to keep the award of restitution open. However, defendant did argue at sentencing that some of the injuries and damages that the victim was asserting were not caused by the assault and that some of the medical bills were the result of medical conditions that existed before the assault. Moreover, when the victim sought additional restitution, defendant challenged the amount of restitution and whether the losses were sustained by the victim as a result of the offense. As the trial court observed, the award of open-ended restitution could potentially expose defendant to a lifetime of paying restitution. We decline to hold that defendant’s failure to specifically object to the trial court’s award of open-ended restitution at sentencing precludes him from challenging the amount of a future request for restitution, particularly when the procedure outlined by the trial court for future restitution provided for automatic restitution if the victim provided a statement by the doctor that the treatment was “related to the original assault and reasonably necessary for her treatment” Defendant’s challenge to the victim’s request for additional restitution was sufficient to preserve his right to an evidentiary hearing.

When faced with the victim’s second request for restitution, defendant sought permission to conduct additional discovery and requested an evidentiary hearing. Because defendant challenged the amount of restitution and whether the losses were sustained by the victim as a result of the offense when the victim sought restitution for the second time, defendant was entitled to an evidentiary hearing in which the prosecutor would bear the burden of establishing by a preponderance of the evidence that the claimed expenses were related to the assault. *Id.* Contrary to the trial court’s assertion, the January 14, 2004, hearing was not an evidentiary hearing. There were no witnesses, no testimony was taken, and no evidence was presented. Under *Gahan*, the trial court should have conducted an evidentiary hearing regarding the victim’s second request for restitution.

Defendant also argues that the trial court erred in denying defendant’s request to engage in discovery regarding the victim’s request for additional restitution. According to defendant, due process entitled defendant to discovery because the victim had pre-existing medical conditions and conditions related to aging, and defendant should have been afforded the opportunity to show that some of her treatments were not related to the assault. In *Gahan*, our Supreme Court held that the Crime Victim’s Rights Act affords “criminal defendants adequate [due] process.” *Id.* at 277. According to the court in *Gahan*, “the Crime Victim’s Rights Act not only complies with due process by affording defendants an evidentiary hearing to establish the proper amount of restitution, it also contains additional safeguards that prevent deprivation of liberty when criminal defendants are actually unable to compensate their victims.” *Id.* We therefore conclude that granting defendant the right to present evidence and cross-examine witnesses at an evidentiary hearing will adequately safeguard his due process rights.

Because the issue is not raised by defendant, our holding presumes, without deciding, that the trial court has the authority to enter an order of probation providing for open restitution and then continue to award restitution after the order of probation has been discharged. Although defendant challenged the propriety of the trial court entering an order of restitution after defendant had been discharged from probation before the trial court, inexplicably, he does not raise the issue anew on appeal. In this regard, we note simply that a victim has a constitutional

right to restitution, Const 1963, art 1, § 24, and that MCL 780.766(13) provides that “[a]n order of restitution . . . remains effective until it is satisfied in full.”

We vacate the second order of restitution and remand for the trial court to conduct an evidentiary hearing on this issue. We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ Janet T. Neff

/s/ Jessica R. Cooper